

ORDER NO. 3379

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Ex Parte Communications

Docket No. RM2016-4

ORDER ADOPTING FINAL RULES FOR
EX PARTE COMMUNICATIONS

(Issued June 22, 2016)

I. INTRODUCTION

In this Order, the Commission adopts final rules concerning ex parte communications. The final rules adopted by this Order amend existing Commission rules and remove obsolete rules no longer applicable under the Postal Accountability and Enhancement Act (PAEA), Pub. L. No. 109-435, 120 Stat. 3218 (2006). The final rules are located at 39 CFR part 3008. Existing rules located at §§ 3000.735-501, 502, 3001.5(o), and 3001.7 are amended to reflect the revised location of the ex parte communications rules. Existing rules located at 39 CFR part 3000 are renumbered for consistency with *Federal Register* guidance.

The rules as adopted incorporate suggestions offered by commenters that restructure some rules as proposed, but do not materially affect their substance. The initial approach taken by the Commission was to codify only what were considered mandatory ex parte communications requirements in the Code of Federal Regulations (CFR) applicable to a limited set of Commission docket types. The Commission also proposed to issue a more comprehensive policy document to include ex parte communications requirements for other possible docket types.¹ The Commission understands comments suggesting the proposed approach would cause confusion concerning when the mandatory rules apply versus when the policy applies. The Commission has adopted modified rules to alleviate this confusion by making the rules inclusive of all proceeding types before the Commission with specific exceptions. This is a change in form, but not substance.²

The change in structure also is intended to clarify that the Commission in most instances will effectively take a permit-but-disclose approach to ex parte communications, which was suggested by many of the commenters. However, given the opportunities the Commission provides to participants to avoid ex parte communications issues altogether, the rules do not encourage ex parte communications as the norm.³ The proposed changes in structure also are intended to clarify that penalties for violating ex parte communication rules only apply to very limited proceeding types.

¹ The opportunity to comment on both the rules and the policy were provided in Order No. 3005. Notice of Proposed Rulemaking Regarding Ex Parte Communications, January 8, 2016 (Order No. 3005).

² The Commission's internal policy is revised to reflect the changes in the final rules and will be made available on the Commission's website.

³ For example, participants generally have sufficient opportunities to make their views known by filing documents on the Commission's website during the course of a proceeding.

II. BACKGROUND

On January 8, 2016, the Commission issued Order No. 3005, introducing a proposed revision and reorganization of its rules concerning ex parte communications. See Order No. 3005. Order No. 3005 explained that the current rules concerning ex parte communications are located at §§ 3000.735-501, 502, and 3001.7. See *id.* The Commission identified a need to revise the existing rules for several reasons. The existing rules contained significant redundancy between the requirements of § 3000.735-501 and the requirements of § 3001.7. Furthermore, the existing rules made it difficult to identify who qualified as Commission “decision-making personnel” without referring to unrelated sections of the CFR.

The existing rules also referred to rate and classification cases under 39 U.S.C. 3624, which were eliminated under the PAEA. Finally, the existing rules lacked guidance for Commission personnel on how to treat ex parte communications falling outside the scope of the specific docket types mentioned.

The operative statute requires the Commission to restrict ex parte communications only in matters where the Commission must provide an opportunity for a hearing on the record pursuant to 5 U.S.C. 556 through 557. Under the PAEA, the Commission is only required to provide an opportunity for a hearing in matters regarding a change in the nature of postal services pursuant to 39 U.S.C. 3633. In addition to nature of service matters, Commission regulations historically have extended restrictions on ex parte communications to post office appeal cases pursuant to 39 U.S.C. 404(d)(5) and (6) and complaint cases pursuant to 39 U.S.C. 3662. The Commission considers the restriction appropriate because of the potential impact ex parte communications might have on participants and their associated rights in those types of proceedings. See Order No. 3005 at 2-3.

In addition to the above three types of proceedings—nature of service, post office closings, and complaints—many other types of proceedings come before the Commission. Accordingly, the Commission attached as a library reference to Order No. 3005 a new proposed internal policy on the treatment of ex parte communications

applicable to all cases. For consistency with prevailing principles regarding agency treatment of ex parte communications,⁴ and for simplicity and efficiency of administration, the Commission policy requires Commission personnel to treat ex parte communications similarly in all proceeding types. In Order No. 3005, the Commission sought public comment on the proposed rules and the attached internal policy.⁵

The commenters provide instructive perspectives on the Commission's proposed rules. Notably, the commenters alert the Commission to the confusion caused by proposing both an internal policy applicable to all cases and enforceable only on Commission personnel, and regulations applicable only to specific types of cases and applicable to all persons. This final Order is intended to remedy the confusion surrounding when ex parte restrictions apply, and when and what penalties may be imposed. The changes to the proposed rules reflect the input of the commenters but do not materially change the operation of the proposed rules. The final rules formalize, but do not materially change, the Commission's current practice for handling ex parte communications.

III. COMMENTS

On February 29, 2016, the Commission received comments from the Postal Service,⁶ the Public Representative,⁷ MPA—the Association of Magazine Media

⁴ Library Reference PRC-LR-RM2016-4/1, January 8, 2016. See Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking*, May 1, 2014 (prepared for consideration of the Administrative Conference of the United States); Administrative Conference of the United States, Administrative Conference Recommendation 2014-4, June 6, 2014 (Recommendation 2014-4).

⁵ Order No. 3005 at 8. The Commission granted the Postal Service's request for an extension of time to file comments through February 29, 2016, and to file reply comments through March 15, 2016. Order No. 3076, Order Granting Extension of Time to File Comments, February 12, 2016. See Motion for Extension of Time to Submit Comments on Proposed Ex Parte Communications Rulemaking, February 11, 2016.

⁶ United States Postal Service Comments on Proposed Ex Parte Communications Rules, February 29, 2016 (Postal Service Comments).

⁷ Public Representative's Comments, February 29, 2016 (PR Comments).

(MPA),⁸ and a group of interested mailer organizations (Joint Commenters).⁹ On March 15, 2016, the Commission received reply comments from the Postal Service¹⁰ and the Public Representative.¹¹

While the commenters either support the Commission's effort or find it reasonable for the Commission to ensure that its rules concerning ex parte communications promote transparency and fairness,¹² several commenters have concerns regarding the scope of the restrictions of the proposed rules and internal policy. See Postal Service Comments at 2, 3-7; Joint Comments at 5-7.

A. Types of Proceedings to which the Prohibition Against Ex Parte Communications Applies

The Postal Service, MPA, and the Joint Commenters each express concern that the Commission policy treating all case types similarly is more restrictive than is necessary. See Postal Service Comments at 3-7; MPA Comments at 2-5; Joint Comments at 4-5. They note that the Administrative Procedure Act (APA) expressly prohibits ex parte communications in formal rulemakings only. Postal Service Comments at 3; MPA Comments at 3; Joint Comments at 4. The Postal Service, MPA,

⁸ Comments of MPA—The Association of Magazine Media, February 29, 2016 (MPA Comments).

⁹ Joint Comments of the Association of Mail Electronic Enhancement, the American Catalog Mailers Association, Inc., the Association of Postal Commerce, the Direct Marketing Association, Envelope Manufacturers Association, Epicomm, IDEAlliance, the Major Mailers Association, National Postal Policy Council, News Paper Association of America, Parcel Shippers Association, Saturation Mailers Coalition, the American Forest & Paper Association, and the National Association of Presort Mailers, February 29, 2016 (Joint Comments).

¹⁰ Reply Comments of the United States Postal Service, March 15, 2016 (Postal Service Reply Comments).

¹¹ Public Representative's Reply Comments, March 15, 2016 (PR Reply Comments).

¹² See Postal Service Comments at 2 ("The Postal Service strongly supports the principles of transparency and fairness the proposed rules and policy are intended to promote...."); PR Comments at 4 ("The Public Representative supports the Commission's interest in taking a fresh look at...ex parte communications in light of the enactment of the PAEA in 2006...."); MPA Comments at 1 ("The Commission's decision to review and revise its current ex parte rules is reasonable."); Joint Comments at 3 ("The Joint Commenters support the goal of promoting the transparency and integrity of proceedings before the Commission.").

and the Joint Commenters appear to agree that the proposed rules unnecessarily restrict desirable communications in informal proceedings. See Postal Service Comments at 3; MPA Comments at 3; Joint Comments at 3. Each discuss *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), to emphasize the value of informal agency contacts with public stakeholders in regulated industry communities. See Postal Service Comments at 7; MPA Comments at 3; Joint Comments at 3. The Postal Service, MPA, and the Joint Commenters express concern that the Commission's policy is not in accord with Recommendation 2014-4. Postal Service Comments at 5-7; MPA Comments at 4-5; Joint Comments at 6. The Joint Commenters state that "[t]he proposed prohibition on *ex parte* communications in informal rulemakings is inconsistent with the long-standing recommendation of the Administrative Conference and the prevailing practice among other federal agencies." Joint Comments at 7. The Public Representative suggests that enforceability of the internal policy as it affects nonemployees is a potential issue. PR Comments at 5.

The Postal Service proposes several modifications to the proposed rules. The Postal Service recommends that *ex parte* communications be prohibited only "in 'contested proceedings' where there are material issues in dispute." Postal Service Comments at 10. It also proposes that the Commission's decision to apply the restrictions to a particular proceeding should be based upon specific criteria and that the Commission should give notice when the rules will apply. *Id.* The Postal Service proposes that the definition of an *ex parte* communication be limited to those "regarding the merits" of a matter before the Commission. *Id.* at 14. Another Postal Service proposal suggests exempting communications regarding general issues of domestic or international postal policy, postal operations, or other statutory responsibilities not associated with the merits of a contested proceeding. *Id.* at 15.

In her reply comments, the Public Representative raises concerns about the applicability of the rationale discussed in *Sierra Club*. PR Reply Comments at 2. Though the D.C. Circuit noted several benefits in allowing or encouraging informal communications with regulatory agencies, the Public Representative notes that the

Commission has a “relatively unique mission” and generally does not conduct the type of large-scale programs to which the Court may have been referring. *Id.* The Public Representative also states that the Commission’s authority typically does not include exercising the same type of industry enforcement action, such as imposing fines or other penalties for failing to meet federal standards. *Id.* The Public Representative notes that one of the Court’s stated benefits to allowing ex parte communication was “[s]purring the provision of information which the agency may need.” *Id.* (quoting *Sierra Club*, 657 F.2d 298 at 401). The Public Representative lists current Commission practices highlighting the Commission’s commitment to seeking information from outside sources, including providing an opportunity for reply comments in almost all dockets, “extremely generous policy” of granting extensions of time to file comments, acceptance of late-filed comments, and reconsideration of stated opinions. PR Reply Comments at 2. The Public Representative characterizes the Commission as going to “considerable effort to accommodate on-the-record input from those who wish to weigh in on a matter within the Commission’s jurisdiction.” *Id.* at 3.

B. When Matters are Before the Commission

The commenters express concern regarding vagueness in when a matter will be considered to be “before the Commission.” MPA states that most agencies do not consider a matter to be before the agency “until it has issued a formal notice of the commencement of the proceeding, an interested person has filed a complaint or formal request that the agency begin the proceeding, or a person has actual knowledge that the proceeding will be noticed.” MPA Comments at 5. MPA states the proposed rules do not adequately define the terms “expected,” “actively preparing,” and “reasonable period of time.” *Id.* at 6.

The Joint Commenters state that Recommendation 2014-4 recommends agencies not impose restrictions on ex parte communications before notice is issued. Joint Comments at 6. The Postal Service criticizes the proposed rules’ definition of when a matter is before the Commission, expressing concern that certain docket types

involve the filing of periodically required reports, namely the Annual Compliance Report. Postal Service Comments at 16. The Postal Service states that because the scope of the Annual Compliance Report is so broad, the proposed rules would prohibit the Postal Service from ever having an off-the-record discussion about costs, revenues, rates, or quality of service, because of the knowledge that proceeding will be before the Commission annually. *Id.* at 16-17. The Postal Service proposes an amendment to proposed § 3008.3(c)(4), adding that knowledge of the regular filing of periodic reports does not place a matter before the Commission. *Id.* at 17. Similarly, the Public Representative questions whether the predictability of certain periodic filings necessarily puts participants on notice of certain proceedings. PR Comments at 6-7.

C. Recommended Approach: Permit but Disclose

Several commenters note that the Administrative Conference of the United States considers a general prohibition on ex parte communications to be undesirable. *See, e.g.*, MPA Comments at 4; Joint Comments at 7. The Postal Service, MPA, and the Joint Commenters each suggest an approach more comparable to the approach employed by other agencies.

The Postal Service lists the approaches taken by the Department of Justice (DOJ), Federal Communications Commission (FCC), and Federal Energy Regulatory Commission (FERC). Postal Service Comments at 6-7. The Postal Service states the FERC limits ex parte restrictions to “contested on-the-record proceedings,” while the FCC classifies informal rulemakings as “permit-but-disclose” proceedings, and the DOJ permits ex parte communications subject to disclosure. *Id.* at 7 (quoting 18 CFR 385.2201; 47 CFR 1.1206; and 28 CFR 50.17(b) through (c), respectively).

MPA suggests that the Commission need not go as far as the FERC, identifying a common alternative of permitting ex parte communications but requiring public disclosure of their substance. MPA Comments at 4. Similarly, the Joint Commenters state that “[t]he Commission’s proposed rules should be revised, consistent with APA requirements for reasoned decision making, to allow the Commission to permit but

disclose any *ex parte* communications that it relies on in the context of an informal rulemaking proceeding.” Joint Comments at 8.

In its reply comments, the Postal Service suggests that Executive Order 11570, issued by President Nixon shortly after the enactment of the Postal Reorganization Act of 1970, and referenced in the Public Representative’s comments, may have “envisioned the ‘permit-but-disclose’ approach” rather than an outright prohibition. Postal Service Reply Comments at 4.

D. Penalties

The Public Representative expresses concern about the enforceability of the internal policy on individuals outside the Commission. PR Comments at 5. Although in Order No. 3005 the Commission stated that the policy “will not be binding on persons outside of the Commission,” it is evident from the comments that there is uncertainty and ambiguity regarding the applicability of certain restrictions across both the rules and internal policy. See Order No. 3005 at 8.

MPA, in its discussion of the ambiguity of the definition of a matter before the Commission, alludes to the “potentially draconian consequences of an adverse Commission finding.” MPA Comments at 6. The Joint Commenters state that the penalties listed in proposed §§ 3008.7(a) and (b) “may be appropriate in the context of an improper *ex parte* contact in an adjudicatory proceeding, but they are excessive in the context of an informal rulemaking.” Joint Comments at 8-9. The Joint Commenters fear the penalties would be “especially punitive” where the communication was made prior to notice of the informal rulemaking. *Id.* at 9.

E. Postal Service’s Proposed Rules

The Postal Service includes its own proposed rules regarding *ex parte* communications. Postal Service Comments, Appendix A (Postal Service Proposed Rules). The proposed rules are a “redline” revision of the Commission’s proposed rules and include line changes in particular sections.

1. Part 3000, Subpart B

Postal Service Proposed Rule 3000.735-501(a) changes the description of the Commission's internal policy to read that the policy applies only to interactions "regarding the merits of certain contested proceedings" before the Commission. Postal Service Proposed Rules 3000.735-501(b) and 3000.735-502 remain unchanged from the Commission's proposed rules.

2. Section 3008.1

The Postal Service does not propose to change the applicability provisions of proposed §§ 3008.1(a) through (d). However, Postal Service Proposed Rule 3008.1(e) narrows the scope of the Commission's proposed rule. The Postal Service's revision states that:

[a]ny other contested proceeding in which the Commission, in its discretion, determines that it is appropriate to apply the rules of this section based on considerations of fairness or for other reasons, and provides notice on the public record of the proceeding that the rules of this section will apply (and the reasons therefor). For purposes of this section, "contested proceeding" means any docketed proceeding before the Commission in which there are multiple adverse parties and/or disputed issues of fact, law or policy.

This revision adds specific conditions for the application of ex parte restrictions, including the type and subject of a matter before the Commission.

3. Section 3008.2

The Postal Service's proposed revisions to proposed § 3008.2(a), setting forth the definition of ex parte communications, include adding the qualifier that the communication be one "regarding the merits of a matter" before the Commission. Postal Service Proposed Rule 3008.2. The Postal Service defines a communication "regarding the merits" as "one that is intended to affect, or capable of affecting the

outcome of a proceeding, or intended to influence, or capable of influencing a Commission decision on any substantive issue in the proceeding.” Postal Service Proposed Rule 3008.2(a).

Postal Service Proposed Rule 3008.2(b) makes a minor revision to proposed § 3008.2(b)(3) and adds two exceptions to the definition of ex parte communications. Proposed § 3008.2 states the exception for communications made during off-the-record technical conferences where public notice of the event is provided and the event is open to all persons participating in the matter. The Postal Service’s proposed change revises the exception to read that the event must be open to all persons participating in the matter before the Commission “as a party, intervenor, or Public Representative.” Postal Service Proposed Rule 3008.2(b)(3).

The Postal Service removes proposed § 3008.2(b)(5), “communications not material to the matter before the Commission,” and adds the following two exceptions, located at §§ 3008.2(b)(5) and (6):

(5) Questions or comments seeking to explain or clarify the meaning or operation of a statement, term, technical reference, or description of methodology used by the Commission or a participant in a proceeding, or to ascertain or confirm the accuracy of the Commission’s (or participant’s) understanding or interpretation of it; and

(6) Communications regarding general issues of domestic or international postal policy, postal operations, or other statutory responsibilities of the Commission not associated with proceedings identified in part 3008.1 of this chapter.

The Postal Service states the Commission’s proposed § 3008.2(b)(5) is not well defined and would be unnecessary if ex parte communications were limited to those “regarding the merits.” Postal Service Comments at 14. The Postal Service suggests the sixth exception to allow for general discussions about the postal industry. *Id.* at 15.

4. Section 3008.3

The Postal Service proposes that the definition of a matter before the Commission not include matters where the person “has knowledge that a request to initiate a proceeding is expected to be filed.” See *id.* at 17. Postal Service Proposed Rule 3008.3 removes the Commission’s proposed § 3008.3(b). The Postal Service also proposes removing the explanation that the mere potential that a request may be filed does not place a matter before the Commission, and that an affirmative action or actively preparing a request with the intent to file must exist. *Id.* at 16.

Alternatively, the Postal Service suggests amending § 3008.3(c)(4) by adding that “mere knowledge that a periodic report will be filed at regular intervals as required by statute or regulation” does not place a matter before the Commission. *Id.*

5. Section 3008.4

The Postal Service does not propose any revisions to proposed § 3008.4, defining the persons subject to the ex parte communications rules.

6. Section 3008.5

The Postal Service proposes to amend the prohibitions set forth in proposed § 3008.5. Postal Service Proposed Rule 3008.5(a) narrows the scope of prohibited communications to only those “regarding the merits of a matter before the Commission.” Postal Service Proposed Rule 3008.5(a).

The Postal Service also proposes to revise proposed § 3008.5(b), regarding the Commission’s reliance on information obtained through ex parte communications. Where the Commission’s proposed rule prohibits reliance on information obtained through ex parte communications, the Postal Service proposes to allow reliance if certain circumstances are present, most notably the opportunity for rebuttal. Postal Service Comments at 19-20. Postal Service Proposed Rule 3008.5(b) reads as follows:

Commission decision-making personnel may rely upon information obtained through ex parte communications in determining the merits of a proceeding only where the communications are made part of the record pursuant to part 3008.6(b), where an opportunity for rebuttal has been provided pursuant to part 3008.6(d), and where reliance on the information will not cause undue delay or prejudice to any party.

The Postal Service states that the revision allows the Commission to consider “highly relevant” statements potentially made by those unfamiliar with Commission practice. Postal Service Comments at 19. Furthermore, the Postal Service states that proposed § 3008.6(c), allowing the Commission to disregard a factual assertion or rebuttal, presupposes that the Commission may, in some circumstances, decide to consider the information. *Id.*

Proposed § 3008.5(c) is unchanged by the Postal Service’s proposed revisions.

7. Section 3008.6

The Postal Service proposes extensive revisions to proposed § 3008.6. In proposed § 3008.6(a), the Postal Service proposes to change the Commission “will not” to the Commission “may not” consider an ex parte communication. Postal Service Proposed Rule 3008.6(a).

The Postal Services raises concerns about the treatment of sensitive or confidential information submitted in an ex parte communication. Postal Service Comments at 17-18. Postal Service Proposed Rule 3008.6(b) reflects this concern, as the Postal Service includes proposed guidance for the treatment of sensitive information. The Postal Service’s adds, in redline, the following:

(b) Commission decision-making personnel who receive, or who make or knowingly cause to be made, ex parte communications prohibited by this part shall immediately notify all participants that the communications will need to be disclosed on the public record, and provide an opportunity

for the participants to apply for non-public treatment of any materials or information protected from disclosure under applicable law. Any such application shall be submitted to the Commission within five business days after notification. The Commission decision-making personnel shall then promptly place, or cause to be placed, on the public record of the proceeding:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communications, including the names of all participants and the date(s) of such communications;

...

(4) In placing information or materials in the public record under this part, the Commission shall withhold any non-public information that a participant in the communication has demonstrated is exempt from disclosure under applicable laws, and file the non-public information under seal pursuant to the procedures identified in its rules of practice and procedure.

The Postal Service also adds a requirement upon receipt of communications seeking to explain or clarify the meaning as set forth in Postal Service Proposed Rule 3008.2(b)(5), where the comment ultimately influences the Commission decision.

Postal Service Proposed Rule 3008.6(c) reads as follows:

Commission decision-making personnel who receive, or who make or knowingly cause to be made, communications that are described in part 3008.2(b)(5) of this chapter shall follow the disclosure requirements set forth herein in part 3008.6(b) in the event that such communications affect the outcome of the proceeding or influence the Commission's decision on any substantive issue in the proceeding.

The Postal Service proposes to move the Commission's proposed § 3008.6(c) regarding opportunity for rebuttal to § 3008.6(d) but does not otherwise amend the rule.

8. Section 3008.7

The Postal Service does not propose any amendments to proposed § 3008.7 regarding penalties for violations of the ex parte communication rules.

F. Additional Comments

The Public Representative points to Recommendation 2014-4, suggesting that agencies should explain whether social media communications fall within the rules' definition of ex parte communications. PR Comments at 7. The Public Representative also provides background information on the Commission's authority for its existing rules, as well as the Administrative Conference of the United States and its relevant report and recommendation. *Id.* at 8-13.

The Public Representative suggests conforming the numerical designation of the rules in 39 CFR part 3000 consistent with the *Federal Register's* current preferences. *Id.* at 14. The Public Representative recommends replacing the hyphenated six-digit extensions with standard one-or-two-digit extensions. *Id.*

IV. COMMISSION ANALYSIS

A. Application of Rules Concerning Ex Parte Communications and Penalties for Violations

The changes to the proposed rules reflect the Commission's recognition of a key area of concern outlined in the submitted comments. Notably, the proposed rules left uncertainty regarding whether ex parte communications were prohibited in all cases and whether penalties were appropriate for violations in informal rulemaking proceedings.

Although the proposed rules were intended only to strictly prohibit ex parte communications in three particular types of matters (nature of service proceedings, appeals of post office closing and consolidations, and rate or service complaints), the Commission recognizes that proposed § 3008.1(e) left broad discretion to the Commission to apply the rules to any case. Such broad authority coupled with the

guidance set forth in the internal policy gave the impression that the Commission could apply the ex parte prohibition and impose penalties for violations in any matter.

Such an interpretation is not the intent of this rulemaking, and therefore clarification and revision are required. The rulemaking is intended to align the Commission's rules with prevailing agency practices and clear the existing rules of redundancy and obsolete references. This rulemaking was not implemented to change, as a practical matter, the status quo for the treatment of ex parte communications. Essentially, this rulemaking was intended to codify the ex parte practices that the Commission has followed for many years.

Several commenters share concern over "draconian" penalties potentially applied in informal rulemakings. See, e.g., MPA Comments at 6; Joint Comments at 6-7. The final rules address this concern. Final § 3008.1 makes clear that the ex parte restrictions will indeed apply to all cases other than the listed exceptions or cases exempted by order. However, the change to the provision for penalties specifically states that the penalties will not apply to cases other than the three specific types of proceedings listed.

In operation, the final rules create three classes of proceedings before the Commission. The first class includes nature of postal service proceedings (N cases), appeals of postal service decisions to close or consolidate post offices (A cases), and rate or service complaints (C cases). These proceedings will be subject to the ex parte rules, and any ex parte communications occurring in these proceedings will be subject to the penalties set forth in §§ 3008.7(b) and (c).

The second class of proceeding includes public inquiry proceedings (PI cases) and international mail proceedings (IM cases) undertaken pursuant to 39 CFR part 3017. Due to the highly collaborative nature of these proceedings and practical limitations on the ability to disclose each and every communication in these

proceedings,¹³ the *ex parte* rules do not apply. Off-the-record communications in these proceedings are expected and permitted. The Commission may also, when circumstances warrant, suspend the application of the *ex parte* rules in other particular cases.

The third class of proceeding includes all other case types before the Commission (Annual Compliance Review (ACR), Competitive Products (CP), Mail Classification (MC), Market Test (MT), Rate (R), Rulemaking (RM), and Tax Computation (T)). The *ex parte* rules will apply to these proceedings, but *ex parte* communications received by the Commission will not be subject to the penalties set forth in § 3008.7. Instead, the communication will be disclosed pursuant to § 3008.6(b). In this way, the rules will operate similarly to the “permit-but-disclose” approach suggested by the Postal Service, MPA, and the Joint Commenters.¹⁴

While the Commission understands and appreciates the benefits of sharing information and promoting a candid dialogue on key issues,¹⁵ the Commission, as a matter of policy, prefers that those benefits be achieved through on-the-record communications. Indeed, as the Public Representative notes, the Commission has demonstrated a commitment to providing opportunities for all interested parties to participate in informal rulemakings. See PR Comments at 2-3. The preference for on-the-record discourse is consistent with, and supportive of, the Commission’s mission

¹³ See Recommendation 2014-4 at 6 (“In formulating policies governing *ex parte* communications in informal rulemaking proceedings, agencies should consider the following factors:...(c) Limitations on agency resources, including staff time, that may affect the ability of agency personnel to accept requests for face-to-face meetings or prepare summaries of such meetings....”).

¹⁴ See Postal Service Comments at 7 (suggesting the permit-but-disclose approach employed by the DOJ and FCC); MPA Comments at 4 (“A common alternative is to permit *ex parte* communications but require public disclosure of their substance.”); Joint Comments at 8 (“The Commission’s proposed rules should be revised...to allow the Commission to permit and disclose any *ex parte* communications that it relies on in the context of an informal rulemaking proceeding.”).

¹⁵ See Postal Service Comments at 6.

to “[e]nsure transparency and accountability of the United States Postal Service and foster a vital and efficient universal mail system.”¹⁶

The final rules aim to strike a balance between the Commission’s preference for the transparency of on-the-record communication with the Postal Service and interested parties, and the commenters’ desire for a permit-but-disclose approach to ex parte communications. While the final rules do not “permit” ex parte communications, in practice the rules will operate quite similarly to the approach proposed by the commenters. Where applicable, an ex parte communication received by the Commission—in cases other than N, A, and C cases—will be subject only to public disclosure and nothing more. Thus, while ex parte communications will not be permitted or encouraged by the Commission, the Commission will treat ex parte communications in a similar manner as the other agencies mentioned by the commenters.

The application of the rules to all cases—other than those exempted by §§ 3008.1(b) through (d)—should alleviate concerns about when the ex parte rules apply. Concerns about “draconian”¹⁷ or “especially punitive”¹⁸ penalties chilling valuable communications should likewise be remedied by the clarification that the penalties will apply only in N, A, and C cases.

By applying the ex parte rules in all case types but only permitting penalties to apply to three specific types of cases, the Commission’s final rules aim to eliminate the need for pre-communication evaluation expressed by some commenters of whether a case is a “contested proceeding” or whether a communication “regards the merits” of a case. The ex parte rules’ applicability to all case types and communications (aside from those excepted by final §§ 3008.1(b) through (d) and § 3008.2(b)), eliminates uncertainty about the nature of the case and/or communication itself. For example,

¹⁶ Postal Regulatory Commission, Strategic Plan 2012-2016, at 4.

¹⁷ See MPA Comments at 6; Joint Comments at 6-7.

¹⁸ See Joint Comments at 9.

under the Postal Service's Proposed Rule 3008.2(a), certain terms create uncertainty about the nature of a communication. Specifically, it is unclear how would one determine whether a communication was "intended to affect or influence" or was "capable of affecting or influencing" a Commission decision. The Postal Service's Proposed Rules would also require a determination of what constitutes a "substantive issue in the proceeding." These necessary determinations would create even more uncertainty than the proposed rules. Accordingly, while the Commission supports the goal of eliminating uncertainty, it declines to adopt the revisions set forth in Postal Service Proposed Rules 3008.1 and 3008.2.

B. Commission Reliance on Information Obtained Through Ex Parte Communications

The Postal Service's recommendation that Commission decision-making personnel be permitted to rely on information obtained through ex parte communications is consistent with applicable law. As explained in *Sierra Club*, accepting ex parte communications creates a danger of having one administrative record before the public, and another record before the Commission. *Sierra Club*, 657 F.2d at 401. However, the danger is avoided where the agency relies only on information that is made part of the public record. *Id.* Proposed § 3008.6(c) already contemplates giving participants an opportunity to rebut ex parte communications received and placed on the public record. Reliance on the information received in either an ex parte communication, or any rebuttal, is appropriate to consider when the communications are made part of the public record.

Accordingly, the final rules adopt, in part, the suggestions made in Postal Service Proposed Rule 3008.5(b), regarding Commission reliance on information obtained through ex parte communications. This change is consistent with prevailing agency guidance¹⁹ and with the underlying policy of fairness and transparency, particularly

¹⁹ See Recommendation 2014-4 at 7-8.

given the provision providing an opportunity for rebuttal of information received via ex parte communication and considered in decision-making. The final rules contain slightly different language than the Postal Service Proposed Rules to enhance clarity and consistency throughout part 3008.

C. When a Matter is Before the Commission

The Commission acknowledges the comments regarding the definition of when a matter is before the Commission, triggering the application of the ex parte restrictions. The commenters correctly point out that some agencies' ex parte restrictions apply only upon formal notice of commencement of the proceeding. However, as the Public Representative notes, the Commission is differently situated than other administrative agencies, and its current practices go to "considerable effort to accommodate" on-the-record communications. See PR Reply Comments at 2-3. Indeed, the Commission generally makes public every matter it considers. The docket system provides ample opportunity for communication on the record.

Under specific circumstances, the APA states that an agency's ex parte communications restrictions may be applied "beginning at such time as the agency may designate," but the prohibitions must apply in cases where "the person responsible for the communication has knowledge that [the case] will be noticed." 5 U.S.C. 557(d)(1)(E). If this requirement were to be applied to proceedings involving periodic reports, such as the Annual Compliance Determination (ACD), the Postal Service contends that all communications would be barred because the filing party always will have knowledge that the case will be noticed. See Postal Service Comments at 16.

The final rules address this concern by eliminating the prior knowledge provision where the matter before the Commission is a periodic report, such as the ACD, or the Commission's review required by 39 U.S.C. 3622(d)(3) that should commence later this year. The effect of this change is to not consider these types of matters as being before the Commission until the Commission notices the start of proceeding, unless the Commission issues a notice prior to that time specifically restricting ex parte

communications. The matter is no longer before the Commission once the Commission issues its final report or review.

D. Protection of Sensitive Material

The Postal Service expresses concern about the treatment of sensitive or confidential information submitted in ex parte communications. Postal Service Comments at 17-18. The Postal Service suggests revising the proposed rules to require the Commission to advise the disclosing party that the communication must be disclosed and allow an opportunity for an application for non-public treatment to be filed. Postal Service Proposed Rule 3008.6(b).

The Commission's rules located at 39 CFR part 3007 set forth the procedures for the treatment of sensitive material filed on the record in docketed proceedings. Proposed § 3008.6(b) dictates that material submitted not in a docketed proceeding but as part of an ex parte communication must be disclosed in order to be considered by the Commission.

Until disclosure, however, the Commission will treat known sensitive material as confidential, subject to Freedom of Information Act requirements. For example, the Commission may not allow outside persons access to information provided by the Postal Service and identified as exempt from public disclosure. See 39 U.S.C. 504(g). The existing statutory safeguards render it unnecessary for the Commission's ex parte rules to further protect sensitive material. Accordingly, the Commission declines to adopt the Postal Service's proposed rule on the protection of sensitive material included in an ex parte communication.

E. Communications Made via Social Media.

The definition of an ex parte communication set forth in proposed § 3008.2(a) includes electronic communications. While most social media interactions are made electronically, social media interactions pose a complex issue requiring further

consideration. The Commission takes the Public Representative's suggestion under advisement.

F. Recodification of Part 3000

The Commission agrees with the Public Representative that this rulemaking provides an appropriate opportunity to make the numbering of sections in part 3000 consistent with rest of the Commission's rules. As the Public Representative notes, the recodification is not a substantive change to the rules. See PR Comments at 14. This change is consistent with this rulemaking's goal of achieving clarity and ease of understanding in the Commission's procedural rules.

V. CHANGES TO THE PROPOSED RULES

The final rules incorporate many of the suggestions identified in the comments. While the suggestions require the structure of the final rules to change from those initially proposed in Order No. 3005, the substance of the rules and their effect on participants remains the same. Differences between the proposed and final rules are described below.

A. Section 3008.1

Proposed § 3008.1 identified the types of Commission matters subject to ex parte restrictions. Listed among those types of matters were nature of postal service proceedings, appeals of post office closings and consolidations, and rate or service complaints. The rule also made applicable, "any other matter in which the Commission, in its discretion, determines that it is appropriate to apply the rules." Order No. 3005 at 12. In order to address commenters' concerns about vagueness and uncertainty of the rules' applicability, the Commission amends proposed § 3008.1 as follows:

1. Section 3008.1(a)

While the proposed rule lists the types of Commission dockets to which the rules apply, the final rules state that the rules of part 3008 apply to all Commission proceedings except for those listed in §§ 3008.1(b) through (d).

2. Sections 3008.1(b) Through (d)

The final rule identifies three types of proceedings to which the rules concerning ex parte communication will not apply. Section 3008.1(b) exempts public inquiry (PI) proceedings undertaken to gather information and which are not intended to result in a binding Commission decision. Section 3008.1(c) exempts international mail (IM) proceedings undertaken pursuant to 39 CFR part 3017. Section 3008.1(d) permits the Commission to identify particular proceedings where the rules will not apply.

B. Section 3008.3

The final rule removes the prior knowledge provision when the matter before the Commission concern matters such as the ACD or § 3622(d)(3) review. These matters will not be considered before the Commission until noticed, or until the Commission issues a prior notice specifically stating that ex parte rules apply.

C. Section 3008.5

Proposed § 3008.5(b) states that “Commission decision-making personnel shall not rely upon any information obtained through ex parte communications.” The final rules amend this section by allowing the Commission to rely on information obtained through ex parte communications where the communications are made part of the record and the Commission provides an opportunity for rebuttal.

D. Section 3008.7

The final rule moves proposed §§ 3008.7(a) and (b) to §§ 3008.7(b) and (c), respectively. It replaces § 3008.7(a) with an explanation that the penalties for a violation of the ex parte rules are applicable only to nature of postal service proceedings, appeals of post office closings or consolidations, and rate or service complaints.

E. Part 3000

In accord with the Public Representative's suggestion of renumbering part 3000, the final rules recodify existing rules in conformance with the *Federal Register* Document Drafting Handbook.

Existing part 3000, subpart A includes: § 3000.735-101 Cross-reference to employee ethical conduct standards and financial disclosure regulations; § 3000.735-102 Counseling and advisory services; § 3000.735-103 Financial interests; and § 3000.735-104 Outside employment. These four provisions are renumbered with the following two-digit extensions, respectively: §§ 3000.05, 3000.10, 3000.15, and 3000.20.

Existing part 3000, subpart B is amended as described in Order No. 3005. Additionally, the two provisions are renumbered. Proposed § 3000.735-501 is renumbered as § 3000.50. Proposed § 3000.735-502 is reserved as § 3000.55.

VI. ORDERING PARAGRAPHS

It is ordered:

1. Parts 3000 and 3001 of title 39, Code of Federal Regulations, are revised as set forth below the signature of this Order, effective 30 days after publication in the *Federal Register*.

2. Part 3008 of title 39, Code of Federal Regulations, is adopted as set forth below the signature of this Order, effective 30 days after publication in the *Federal Register*.
3. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Stacy L. Ruble
Secretary

List of Subjects

39 CFR Part 3000

Conflicts of interests, Ex parte communications

39 CFR Part 3001

Administrative practice and procedure, Confidential business information, Ex parte communications, Freedom of information, Sunshine Act

39 CFR Part 3008

Administrative practice and procedure, Ex parte communications

For the reasons discussed in the preamble, the Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

Part 3000—STANDARDS OF CONDUCT

1. The authority citation for part 3000 is revised to read as follows:

Authority: 39 U.S.C. 503; 504, 3603; E.O. 12674; 54 FR 15159; 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 56 FR 42547, 3 CFR, 1990 Comp., p. 396, 5 CFR parts 2634 and 2635.

Subpart A—General Provisions

§§ 3000.735-101 through 3000.735-104 [Redesignated as §§ 3000.5, 3000.10, 3000.15, 3000.20]

2. Redesignate §§ 3000.735-101 through 3000.735-104 as §§ 3000.5, 3000.10, 3000.15, 3000.20, respectively.

3. Revise subpart B of part 3000 to read as follows:

Subpart B—Ex Parte Communications

Sec.

3000.50 Ex parte communications prohibited.

3000.55 [Reserved]

§ 3000.50 Ex parte communications prohibited.

(a) The Commission maintains a written employee policy regarding ex parte communications applicable to all interactions, oral or in writing (including electronic), between Commission decision-making personnel, and the United States Postal Service or public stakeholders in matters before the Commission. It is the responsibility of all Commission personnel to comply with this policy, including the responsibility to inform persons not employed by the Commission of this policy when required. The policy is available for review on the Commission's Web site at www.prc.gov.

(b) Additional ex parte communications requirements, applicable to specific docket types, are described in part 3008 of this chapter.

§ 3000.55 [Reserved]

Part 3001—RULES OF PRACTICE AND PROCEDURE

3. The authority citation of part 3001 continues to read as follows:

Authority: 39 U.S.C. 404(d); 503; 504; 3661.

§ 3001.5 Definitions [Amended]

4. Amend § 3001.5 by removing and reserving paragraph (o).

§ 3001.7 [Removed and Reserved]

5. Remove and reserve § 3001.7.

6. Add part 3008 to read as follows:

Part 3008—EX PARTE COMMUNICATIONS

Sec.

3008.1 Applicability.

3008.2 Definition of ex parte communications.

3008.3 Definition of a matter before the Commission.

3008.4 Definitions of persons subject to ex parte communication rules.

3008.5 Prohibitions.

3008.6 Required action upon ex parte communication.

3008.7 Penalty for violation of ex parte communication rules.

Authority: 39 U.S.C. 404(d)(5); 503; 504; 3661(c); 3662.

§ 3008.1 Applicability.

(a) The rules in this section are applicable to all Commission proceedings except for the instances identified in paragraphs (b) through (d) of this section.

(b) The rules in this section are not applicable to public inquiry (PI) proceedings, undertaken to gather information and which are not intended to result in a binding Commission decision.

(c) The rules in this section are not applicable to international mail (IM) proceedings undertaken pursuant to part 3017 of this chapter.

(d) The rules in this section are not applicable to specifically identified proceedings upon written directive from the Commission.

§ 3008.2 Definition of ex parte communications.

(a) Subject to the exceptions specified in paragraph (b) of this section, ex parte communications include all communications, oral or written (including electronic), between Commission decision-making personnel, and the Postal Service or public stakeholders regarding matters before the Commission.

(b) Ex parte communications do not include:

(1) Documents filed using the Commission's docketing system;

(2) Communications during the course of Commission meetings or hearings, or other widely publicized events where the Commission provides advance public notice of the event indicating the matter to be discussed, the event is open to all persons participating in the matter before the Commission, and a summary of the event is provided for the record;

(3) Communications during the course of off-the-record technical conferences associated with a matter before the Commission, or the pre-filing conference for nature of service cases required by § 3001.81 of this chapter, where advance public notice of the event is provided indicating the matter to be discussed, and the event is open to all persons participating in the matter before the Commission;

(4) Questions concerning Commission procedures, the status of a matter before the Commission, or the procedural schedule of a pending matter, where these issues are not contested matters before the Commission; and

(5) Communications not material to the matter before the Commission.

§ 3008.3 Definition of a matter before the Commission.

(a) A matter is before the Commission at such time as the Commission may designate, but in no event later than the earlier of the filing of a request to initiate a proceeding or the Commission noticing a proceeding.

(b) A matter is also before the Commission at such time as the person responsible for the communication has knowledge that a request to initiate a proceeding is expected to be filed.

(c) Paragraph (b) of this section does not apply to periodic reviews or reports issued by the Commission, or the 10-year review pursuant to 39 U.S.C. 3622(d)(3).

(d) The following explanations apply:

(1) A matter is no longer before the Commission upon the issuance of the final order or decision in the docketed matter;

(2) A matter is again before the Commission upon the filing of a request for reconsideration. The matter remains before the Commission until resolution of the matter under reconsideration;

(3) A matter is again before the Commission upon the remand of a Commission's final decision or order by an appellate court. The matter remains before the Commission until resolution of the matter under remand; and

(4) The mere potential that a request may be filed does not place a matter before the Commission. An affirmative action announcing, or actively preparing, an actual request with the intent to file within a reasonable period of time must be present.

§ 3008.4 Definitions of persons subject to ex parte communication rules.

(a) Commission decision-making personnel include:

- (1) The Commissioners and their staffs;
- (2) The General Counsel and staff;
- (3) The Director of the Office of Accountability and Compliance and staff;
- (4) Contractors, consultants, and others hired by the Commission to assist with the Commission's analysis and decision; and
- (5) Any other employee who may reasonably be expected to be involved in the decisional process.

(b) The Postal Service includes all Postal Service employees, contractors, consultants, and others with an interest in a matter before the Commission. Any interaction between the Postal Service and Commission decision-making personnel concerning a matter before the Commission expresses an interest in the matter before the Commission.

(c) Public stakeholders include all other persons not previously described, with an interest in a matter before the Commission. This includes the Commission non-decision-making personnel identified in paragraph (d) of this section. Any interaction between a public stakeholder and Commission decision-making personnel concerning a matter before the Commission expresses an interest in the matter before the Commission.

(d) Commission non-decision-making personnel include:

- (1) All Commission personnel other than decision-making personnel;

(2) Commission personnel not participating in the decisional process owing to the prohibitions of § 3001.8 of this chapter regarding no participation by investigative or prosecuting officers;

(3) The Public Representative and other Commission personnel assigned to represent the interests of the general public pursuant to 39 U.S.C. 505 in the specific case or controversy at issue (regardless of normally assigned duties); and

(4) Contractors, consultants, and others hired by the Commission to provide an independent analysis of issues before the Commission (and Commission employees assigned thereto).

§ 3008.5 Prohibitions.

(a) Ex parte communications between Commission decision-making personnel, and the Postal Service or public stakeholders is prohibited.

(b) Commission decision-making personnel shall not rely upon any information obtained through ex parte communications unless the communications are made part of the record of the proceeding, where an opportunity for rebuttal has been provided, and reliance on the information will not cause undue delay or prejudice to any party.

(c) Paragraph (a) of this section does not constitute authority to withhold information from Congress.

§ 3008.6 Required action upon ex parte communications.

(a) Commission decision-making personnel who receive ex parte communications relevant to the merits of the proceeding shall decline to listen to such communications and explain that the matter is pending for determination. Any recipient

thereof shall advise the communicator that the communication will not be considered, and shall promptly and fully inform the Commission in writing of the substance of and the circumstances attending the communication, so that the Commission will be able to take appropriate action.

(b) Commission decision-making personnel who receive, or who make or knowingly cause to be made, ex parte communications prohibited by this part shall promptly place, or cause to be placed, on the public record of the proceeding:

- (1) All such written communications;
- (2) Memoranda stating the substance of all such oral communications; and
- (3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in (b)(1) and (2) of this section.

(c) Requests for an opportunity to rebut, on the record, any facts or contentions contained in an ex parte communication which have been placed on the public record of the proceeding pursuant to paragraph (b) of this section may be filed in writing with the Commission. The Commission will grant such requests only where it determines that the dictates of fairness so require. In lieu of actually receiving rebuttal material, the Commission may in its discretion direct that the alleged factual assertion and the proposed rebuttal be disregarded in arriving at a decision.

§ 3008.7 Penalty for violation of ex parte communication rules.

(a) The penalties for violation of ex parte communication rules specified in this section are applicable only to:

(1) Nature of postal service proceedings conducted pursuant to 39 U.S.C. 3661(c);

(2) Appeal of Postal Service decisions to close or consolidate any post office conducted pursuant to 39 U.S.C. 404(d)(5); and

(3) Rate or service complaints conducted pursuant to 39 U.S.C. 3662.

(b) Upon notice of a communication knowingly made or knowingly caused to be made by a participant in violation of § 3008.5(a), the Commission or presiding officer may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the participant to show cause why his/her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(c) The Commission may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Commission, consider a violation of § 3008.5(a) sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.